Supreme Court, U.S.
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Docket No. 82-56

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent

RESPONDENTS' BRIEF IN RESPONSE TO MOTION TO RECONSIDER DENIAL OF PETITION FOR CERTIORARI

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SEE INSIDE COVER FOR ADDITIONAL CASES

Docket No.

In the Supreme Court of the United States

MELVIN BANDY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

Docket No.

In the Supreme Court of the United States

WALLACE CURRY, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,
Petitioners,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

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DOCKET NO. 82-56

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellenic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport, Inc.,
Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

BRIEF IN RESPONSE TO MOTION TO

RECONSIDER DENIAL OF PETITION FOR CERTIORARI

The Petitioners' motion adds nothing to its petition for writ of certiorari which was denied by this Court on October 12, 1982. The motion emphasizes Duris v. Erato Shipping, Inc., 684 F.2d 352 (6th Cir. 1982) decided before certiorari was here denied. Additionally, the Sixth Circuit decision was submitted by the Petitioners in a Supplemental Appendix thirty days before the Court denied certiorari.

Nevertheless the Respondent is aware that this Court has granted certiorari in Duris, sub nom Pallas Shipping Agency v. Duris, 103 S.Ct. 371, and hence it requires analysis. Longshoreman Joseph Duris was injured while working on board a vessel in May, 1975. Shortly after his injury, he began to receive voluntary payments from his employer under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. C.A. 901, et seq., and these benefits were paid until April 26, 1977, at which time his employer filed form LS-208 entitled "Compensation Payment Stopped or Suspended" with the deputy commissioner. On April 8, 1980, more than six months after the noncontested termination of compensation benefits, the action in question was instituted. The Sixth Circuit apparently misunderstood the shipowner's argument because at page 353 it notes that "Pallas argues that Duris' acceptance of compensation in May, 1975, triggered §33 and its short statute of limitations . . ." But according to the question presented for review in the Petition for Certiorari, the shipowner in Duris takes the position that the "award" occurred not by virtue of the initial

acceptance of compensation by the longshoreman in May, 1975, but by the termination of benefits and the filing of form LS-208 in April, 1977. That is, Pallas maintains the award occurred at the last payment.

In the final analysis, Duris rests on the proposition that only if a compensation claim is controverted can there be a true "award" within the meaning of Section 933(b). This is based on the erroneous notion that only in a controverted case can a longshoreman become cognizant of the assignment and the resulting consequences to his third-party remedies. No other Circuit Court has adopted such a view.

The rule laid down by the Fourth Circuit in Simmons[1] is the better reasoned approach and should be adopted by this Court. However, under the peculiar facts of the present cases the approach taken by the Second Circuit also requires that this Court uphold the dismissal of the claim. The Second Circuit's view of when an award occurs is best expressed in Verderame v.

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[1] The Sixth Circuit did not cite Simmons in its Duris decision.

Torm Lines, 670 F.2d 5, 6-7 (2d Cir. 1982), wherein the Court stated:

> "The legislative history of the statute, as outlined in the Supreme Court and ourselves in Rodriguez, makes clear that Congress's purpose was to provide the injured longshoreman, after he knows what his award of compensation benefits will be, with a period of six months within which to decide whether in light of all the circumstances, including the settlement arrived at with the employer without proof of any fault, will bring an action against a third party seeking damages based on its negligence. The longshoreman cannot be expected to make an intelligent decision of this issue until he is in a position to appraise the full nature and extent of his injuries and the shipowner's negligence, and until he knows the total amount of compensation which he can be sure of receiving from the employer or its insured. To hold otherwise would be to force the longshoreman to proceed in the dark. On the other hand, once he is armed with information as to the total benefits he will receive from the insured, he can, with knowledge of the seriousness of his injuries and the extent of the shipowner's negligence, intelligently decide whether an action for damages against a shipowner would be likely to yield him any recovery over and above the compensation benefits plus the fee he would receive to pay his attorney. For these reasons we hold that until the amount of compensation benefits to be fixed, either by order, stipulation of the parties, or informal award, there cannot be an '[a]cceptance of compensation

> under an award in a compensation order' within the meaning of §33(b) of the Act." (Emphasis Supplied).

Thus, the Second Circuit adopts the principle of Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), on which the Fourth Circuit relied in rendering the Simmons decision to the effect that if the compensation payments have terminated and six months thereafter expires before suit is filed, then the suit for damages will be barred.

> "Similarly, in Liberty Mut. Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), relied upon by Torm, although there was no entry of a formal award, not only had the total amount of the compensation benefits payable by the insurer been agreed upon and paid, but compensation had been 'terminated' before an action against the shipowner (in that case by the employer) was commenced." (Emphasis added). Verderame at 7.

To the extent the Sixth Circuit reads Liberty Mutual Insurance Co. v. Ameta & Co., as a first payment case, it is in error. In Liberty Mutual compensation benefits terminated and an LS-208 was filed more than six months before suit was filed. Id. at 1101, 1103.

The Simmons cases are all squarely within the holding of Liberty Mutual and the Second Cirucit's Verderame ruling – all being "last payment" cases. The amount of compensation was fixed when Messrs. Simmons, Bandy, Spratley,[2] McLean, Caldwell, Curry and Harold accepted what they then believed to be their last compensation payment. Therefore, clearly there is no conflict between Liberty Mutual/Simmons and Verderame.

Furthermore, inasmuch as the Sixth Circuit never considered the "last payment - fixed compensation" rationale, it cannot be said to truly conflict with the decisions in the Second and Fourth Circuits.

CONCLUSION

The only basis which Petitioners assert in support of their Motion to Reconsider is the decision of the Sixth Circuit in Duris. However, this decision was cited to the Court before the Petition for Certiorari

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[2] In Spratley benefits were paid pursuant to a compensation order and the action was not commenced until more than six months after the Order was filed.

was denied and does not constitute substantial intervening circumstances. Moreover, the Motion to Reconsider only relates to Issues I in the Petition for Certiorari and not Issue II (whether the employer may voluntarily reassign the right to sue to the longshoreman) and if the Motion is granted, it should only be granted as to Issue I in the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Hugh S. Meredith, certify that on January 6th, 1983, forty (40) copies of this BRIEF IN RESPONSE TO MOTION TO RECONSIDER DENIAL OF PETITION FOR

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